NO. 75-545

IN THE

Supreme Court of the United States

October Term, 1975

CARLA A. HILLS, SECRETARY OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Petitioners,

vs.

THE SCENIC RIVERS ASSOCIATION OF OKLAHOMA and THE ILLINOIS RIVER CONSERVATION COUNCIL,

Respondents.

AMICUS CURIAE BRIEF

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Initially, it should be brought to the court's attention that the State of New Mexico agrees with Respondents on all legal points presented on appeal and adopts them in toto as summarized below:

POINT I

THE DISTRICT COURT AND THE COURT OF APPEALS CORRECTLY RULED THAT NEPA APPLIES TO ALL FEDERAL ACTIONS WHICH SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, WHETHER THAT ACTION CONSISTS OF DIRECT FEDERAL IMPACT ON THE ENVIRONMENT OR ACTIONS TAKEN BY OTHER PERSONS WHICH WILL HAVE A SIGNIFICANT ENVIRONMENTAL IMPACT AND FOR WHICH FEDERAL PERMISSION IS REQUIRED, OR WHICH SET INTO MOTION THE ENVIRONMENTAL DEGRADATION.

POINT II

COMPLIANCE WITH NEPA BY HUD, AS THE ADMINISTERING AGENCY UNDER ILSA, IS NOT EXPRESSLY PROHIBITED BY STATUTE NOR IMPOSSIBLE.

POINT III

CONSIDERATIONS OF IMMENSE ADMINISTRATIVE BURDEN OR WIDESPREAD ADVERSE ECONOMIC IMPACT ARE NOT FACTUALLY SUBSTANTIATED, NOR ARE THEY MATTERS FOR JUDICIAL CONCERN.

In view of several factors, including consideration of judicial economy, we feel it unnecessary to independently brief all of these issues. Respondents have done a commendable job. However, the decision of the court in this case will have great significance for the State of New Mexico, and for this reason we feel it incumbent upon us to elaborate on one point which we consider particularly relevant to our state.

POINT IV

HUD'S LACK OF POWER UNDER ILSA TO ACT IN REGARD TO ENVIRONMENTAL CONSEQUENCES DOES NOT EXCEPT IT FROM THE PROVISIONS OF NEPA, IN VIEW OF NEPA'S PURPOSE OF DISSEMINATING ENVIRONMENTAL INFORMATION.

Petitioners make the argument that the Interstate Land Sales Act (ILSA), 15 U.S.C. Sec. 1701 et seq., does not confer upon the Department of Housing and Urban Development (HUD) any substantive authority, and therefore its actions under the act do not constitute "major federal action." Respondents have successfully refuted this argument in both the District Court and Court of Appeals, and we urge the court to keep Respondents' arguments in mind while considering this brief. However, we feel it necessary to stress to the court, in opposition to Petitioners' arguments, one particular point. The main purpose of NEPA and its environmental impact statement (EIS) requirement is to provide environmental information for not only governmental decision makers but all governmental entities and the public as a whole, "to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. Sec. 4321.

The Congressional intent with regard to NEPA has been recognized by the federal courts in numerous decisions. The United States Court of Appeals, District of Columbia Circuit, in *Scientists' Inst. For Pub. Info. Inc. v. Atomic Energy Com'n.*, 481 F.2d 1079, 1091 (D.C. Cir. 1973), stated:

> "***These procedural requirements are not dispensable technicalities, but are crucial if the statement is to serve *its dual functions of informing Congress, the President, other concerned agencies and the public of the environmental effects of agency action and of ensuring meaningful consideration of environmental factors at all stages of agency decision making.*" [Emphasis added.]

The court in the case of *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2nd Cir. 1972), described NEPA as an "environmental full disclosure law for agency decisic n makers and the general public."

In *Committee For Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971), the court further explained the function of an EIS:

> "***the officials making the ultimate decision, whether within or outside the agency, must be informed of the full range of responsible opinion on the environmental effects in order to make an informed choice. *Moreover, the statement has significance in focusing environmental factors for informed appraisal by the President, who has broad concern even when not directly involved in the decisional process, and in any event by Congress and the public.*" [Emphasis added.]

See also *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972).

Circuit Judge Doyle in the court below specifically rejected Petitioners' argument with the following reference to the EIS requirement of NEPA:

> "One of its purposes is to require the giving of attention to environmental problems regardless of whether the agency has authority to do anything about it." *Scenic Rivers Association of Oklahoma v. Lynn*, 520 F.2d 239, 245 (10th Cir. 1975).

Accordingly, the courts have recognized that an EIS is of tremendous value to a diverse audience and in situations of federal action other than merely the situation in which an agency has authority to do something about the environmental consequences.

Nowhere in NEPA is there language which even remotely supports Petitioners' position of restricting application of the EIS requirement. In fact, the language of NEPA is replete with statements requiring broad implementation of its provisions in

all federal agencies. See 42 U.S.C. Sec. 4331, 4333. Obviously, the policy of NEPA to serve as a provider of environmental information would be severely restricted if it were determined that an EIS is required only in the instance in which an agency or other federal entity has the statutory authority to act with regard to the environmental consequences resulting from its actions. Such an interpretation would be contrary to the fundamental purpose of the act.

Respondents have persuasively shown that, under the facts of this case, the action of HUD, as the implementing agency of ILSA, qualifies as "major federal action significantly affecting the quality of the human environment," on the basis of HUD's participation and the undisputed environmental damage which follows. To remove HUD from the broad realm of NEPA solely for the reason that it does not possess certain statutory authority would be to completely disregard the intent of the Congress as evidenced by the language of the act and as recognized by numerous federal courts. The EIS provides valuable environmental material for use by governmental entities and the public in many areas, as background for proposed future remedies, and as a factual foundation for possible curative legislation.

The application of NEPA to HUD with respect to ILSA is of great importance to New Mexico. Presently, in New Mexico there exist approximately three hundred and fifty separate land subdivisions covering an estimated 1.5 million acres. The financial success of many of these developments is dependent upon sales in interstate commerce. Most developers are forced to abide by the disclosure requirements of ILSA. Such massive development occurring at a rapid pace creates quite a problem for this state as far as maintaining present environmental standards. Moreover, because development is proceeding in areas of widely diverse environmental conditions, often with a very fragile ecological balance, the situation has been exacerbated.

Serious problems have already been created, frequently of diverse cause, with respect to air quality, water quality (liquid

waste) and water supply, solid waste, terrain management, insect and rodent control. Although the effects are obviously widespread, the ultimate results are to a large degree unknown, thus necessitating a massive research and planning effort to adequately cope with these changing conditions.

Control of land developments in New Mexico is now handled by means of the New Mexico Subdivision Act, Sections 70-5-1 et seq., NMSA, 1953 Comp. Under this legislation much of the actual control is delegated to the boards of county commissioners. They are to promulgate regulations covering the following environmental areas: water supply, water quality (liquid waste), solid waste disposal, adequate roads and terrain management. Sec. 70-5-9, *supra.* However, in order to draft appropriate regulations and to properly evaluate the effect that approval of a particular subdivision will have, sufficient environmental data must be available. Unfortunately, the county government is ill-equipped to gather this type of information. While the act provides for public hearings before regulations can be adopted (Sec. 70-5-10, *supra*), and requires subdividers to submit a disclosure statement which is to include some environmental information (Sec. 70-5-17, *supra*), these provisions are incapable of replacing the quality and depth of information which an EIS would make available to agencies entrusted with environmental management and to the general public, including the "ethical purchaser."

The provisions of NEPA make clear that this kind of informational transfer was one of the main purposes of the act.

> "The Congress authorizes and directs that to the fullest extent possible: ***(2) all agencies of the Federal Government shall--***(F) *make available* to states, counties, municipalities, institutions and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment;***." 42 U.S.C. Sec.4332. See also 42 U.S.C. Sec.4331.

In conclusion, we urge the court to affirm the decision of the Court of Appeals. One of the main purposes of NEPA is to

provide information in relation to certain federal actions which significantly affect the environment. The EIS is the vehicle providing that information. Respondents have shown that HUD's action is a "major federal action significantly affecting the quality of the human environment." To rule that HUD as the administering agency for ILSA does not have to file an EIS, because it has no power to act in regard to environmental consequences, would be to close your eyes to the intent and purpose of NEPA.

Respectfully submitted,

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